

## Background

Under 49 U.S.C. 31136(e) and 31315, FMCSA may grant an exemption for a 2-year period if it finds "such exemption would likely achieve a level of safety that is equivalent to, or greater than, the level that would be achieved absent such exemption." The statute also allows the Agency to renew exemptions at the end of the 2-year period. The comment period ended on December 30, 2009 (74 FR 62632).

## Discussion of Comments

FMCSA received no comments in this proceeding.

## Conclusion

The Agency has not received any adverse evidence on any of these drivers that indicates that safety is being compromised. Based upon its evaluation of the 22 renewal applications, FMCSA renews the Federal vision exemptions for Thomas E. Adams, Terry J. Aldridge, Lennie D. Baker, Jr., Jerry D. Bridges, William J. Corder, Gary R. Gutschow, Richard J. Hanna, James J. Hewitt, Albert E. Malley, Eugene P. Martin, David L. Menken, Rodney M. Mimbs, Walter F. Moniowczak, William G. Mote, James R. Murphy, Chris A. Ritenour, Ronald L. Roy, Thomas D. Walden, Thomas E. Walsh, Kevin P. Weinhold, Charles M. Wilkins and Thomas A. Wise.

In accordance with 49 U.S.C. 31136(e) and 31315, each renewal exemption will be valid for 2 years unless revoked earlier by FMCSA. The exemption will be revoked if: (1) The person fails to comply with the terms and conditions of the exemption; (2) the exemption has resulted in a lower level of safety than was maintained before it was granted; or (3) continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31136 and 31315.

Issued on: January 22, 2010.

**Charles A. Horan III,**

*Acting Associate Administrator for Policy and Program Development.*

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**BILLING CODE 4910-EX-P**

## DEPARTMENT OF THE TREASURY

### Order Granting a Temporary Exemption From Certain Government Securities Act Provisions and Regulations in Connection With a Request From ICE Trust U.S. LLC Related to Central Clearing of Credit Default Swaps, and Request for Comments

**AGENCY:** Department of the Treasury, Office of the Under Secretary for Domestic Finance.

**ACTION:** Notice of temporary exemption.

**SUMMARY:** The Department of the Treasury (Treasury) is issuing a temporary exemption from certain Government Securities Act of 1986 provisions and regulations in connection with a request from ICE Trust U.S. LLC to accommodate customer clearing of credit default swaps that reference government securities. Treasury is also soliciting public comment on this order.

**DATES:** *Effective Date:* January 28, 2010.

**FOR FURTHER INFORMATION CONTACT:** Lori Santamarena, Lee Grandy, or Kevin Hawkins, Bureau of the Public Debt, Department of the Treasury, at 202-504-3632.

**SUPPLEMENTARY INFORMATION:** The following is Treasury's order providing a temporary exemption:

#### I. Introduction

Treasury regulates transactions in government securities<sup>1</sup> by government securities brokers<sup>2</sup> and government securities dealers<sup>3</sup> under Section 15C of the Securities Exchange Act of 1934 (Exchange Act), as amended by the Government Securities Act of 1986 (GSA). These regulations impose obligations concerning financial responsibility, protection of customer securities and balances, and recordkeeping and reporting.

On March 6, 2009, Treasury granted temporary exemptions<sup>4</sup> from certain

<sup>1</sup> The term *government securities* is defined at 15 U.S.C. 78c(a)(42).

<sup>2</sup> A *government securities broker* generally is "any person regularly engaged in the business of effecting transactions in government securities for the account of others," with certain exclusions. 15 U.S.C. 78c(a)(43).

<sup>3</sup> A *government securities dealer* generally is "any person engaged in the business of buying and selling government securities for his own account, through a broker or otherwise," with certain exclusions. 15 U.S.C. 78c(a)(44).

<sup>4</sup> 74 FR 10647, March 11, 2009 Order Granting Temporary Exemptions from Certain Provisions of the Government Securities Act and Treasury's Government Securities Act Regulations in Connection with a Request on Behalf of ICE US Trust LLC Related to Central Clearing of Credit Default Swaps, and Request for Comments,

GSA provisions and regulations to ICE Trust U.S. LLC, formerly ICE US Trust LLC (ICE Trust), certain ICE Trust participants, and certain eligible contract participants (ECPs)<sup>5</sup> (the March 6, 2009 order). On December 7, 2009, Treasury extended the expiration date of these exemptions until March 7, 2010 (the December 7, 2009 order),<sup>6</sup> in response to a request from ICE Trust (the request).<sup>7</sup>

ICE Trust also requested that Treasury grant supplemental exemptive relief to permit the clearance of credit default swaps (CDS)<sup>8</sup> transactions on behalf of customers of ICE Trust clearing members. ICE Trust requested an exemption for clearing members, including certain entities affiliated with ICE Trust clearing members,<sup>9</sup> from provisions of the Exchange Act governing government securities transactions, to the extent such provisions would otherwise apply to such clearing members in regard to cleared CDS.<sup>10</sup>

available at: [http://www.treasurydirect.gov/instit/statreg/gsareq/gsareq\\_treasexemptiveorder309.pdf](http://www.treasurydirect.gov/instit/statreg/gsareq/gsareq_treasexemptiveorder309.pdf).

<sup>5</sup> ECPs are defined in Section 1a(12) of the Commodity Exchange Act, 7 U.S.C. 1 et seq. The use of the term ECPs in this order refers to the definition of ECPs as in effect on the date of this order, and excludes persons that are ECPs under Section 1a(12)(C). The temporary exemption provided to ECPs in this order also applies to interdealer brokers that are ECPs.

<sup>6</sup> 74 FR 64127, December 7, 2009 Order Extending Temporary Exemptions from Certain Government Securities Act Provisions and Regulations in Connection with a Request from ICE Trust U.S. LLC Related to Central Clearing of Credit Default Swaps, available at: [http://www.treasurydirect.gov/instit/statreg/gsareq/FR\\_Treasury\\_Order\\_ICE\\_Extension\\_\(12-7-09\).pdf](http://www.treasurydirect.gov/instit/statreg/gsareq/FR_Treasury_Order_ICE_Extension_(12-7-09).pdf).

<sup>7</sup> Letter from Kevin McClear, General Counsel, ICE Trust to the Commissioner of the Public Debt, Van Zeck, December 3, 2009, available at <http://www.treasurydirect.gov/instit/statreg/gsareq/gsareq.htm>.

<sup>8</sup> A CDS is a bilateral contract between two parties, known as counterparties. The value of this financial contract is based on underlying obligations of a single entity ("reference entity") or on a particular security or other debt obligation, or an index of several such entities, securities, or obligations. The obligation of a seller to make payments under a CDS contract is triggered by a default or other credit event as to such entity or entities or such security or securities. Investors may use CDS for a variety of reasons, including to offset or insure against risk in their fixed-income portfolios, to take positions in bonds or in segments of the debt market as represented by an index, or to take positions on the volatility in credit spreads during times of economic uncertainty.

<sup>9</sup> ICE Trust stated that, for purposes of its request, an affiliate means an entity that directly, or indirectly through one or more intermediaries, controls or is controlled by, or that is under common control with, a clearing member.

<sup>10</sup> For purposes of this order, *cleared CDS* means a credit default swap that is submitted (or offered, purchased, or sold on terms providing for submission) to ICE Trust, that is offered only to, purchased only by, and sold only to ECPs (as defined in Section 1a(12) of the Commodity Exchange Act as in effect on the date of this order

Based on the facts presented and the representations made in the request,<sup>11</sup> Treasury is granting this temporary exemption to accommodate customer clearing. We are granting this exemption for ICE Trust clearing members and certain ECPs from government securities broker and government securities dealer registration requirements and related requirements in connection with using ICE Trust to clear CDS transactions of their customers. The exemption is subject to certain conditions and will expire on March 7, 2010, unless Treasury renews, revokes, or modifies it.

In providing this temporary exemption from certain provisions of Section 15C of the Exchange Act, Treasury is not determining whether particular CDS are "government securities" under 15 U.S.C. 78c(a)(42).

## II. Discussion

### A. ICE Trust's Activities and Proposed Customer Clearing Activities

The request describes how ICE Trust currently clears CDS and how the proposed arrangements for central clearing of customers' CDS transactions would operate, including the safeguards associated with customer clearing, as summarized below.<sup>12</sup>

#### 1. ICE Trust's CDS Clearing Activity

According to the request, as of October 30, 2009, ICE Trust has cleared approximately \$2.64 trillion notional amount of the proprietary CDS transactions of its clearing members, based on indices of securities. ICE Trust also intends to clear single-name CDS contracts based on individual reference entities or securities.

(other than a person that is an ECP under paragraph (C) of that section)), and that references a government security.

<sup>11</sup> See note 7, *supra*. The temporary exemption Treasury is granting in this order is based on representations made in the request from ICE Trust, which incorporate representations made by ICE Trust in its request upon which the March 6, 2009 order was based. Treasury recognizes, however, that there could be legal uncertainty in the event that one or more of the underlying representations were to become inaccurate. Accordingly, if this temporary exemption becomes unavailable by reason of an underlying representation no longer being materially accurate, the legal status of existing open positions in cleared CDS associated with persons subject to the unavailable exemption will remain unchanged, but no new positions can be established pursuant to the temporary exemption until all of the underlying representations are again accurate.

<sup>12</sup> ICE Trust represents that there have been no material changes to the representations made in the letter requesting the relief we provided in the March 6, 2009 order, apart from the proposal to clear customer CDS transactions, and ICE Trust has incorporated those representations into the request. See the request for a detailed description of ICE Trust's proposed customer CDS clearing activities.

#### 2. Proposed Activity Clearing CDS Transactions of Members' Clients

ICE Trust has proposed a "Non-Member Framework" for clearing the CDS transactions of its clearing members' clients, under which its clearing members would submit client positions to ICE Trust in one of two ways. Both ways will result in ICE Trust having no market exposure in connection with the cleared CDS transaction. Under the "bilateral model," clients execute a CDS transaction directly with a clearing member (acting in a principal capacity), followed by the clearing member submitting a trade to ICE Trust with corresponding terms. ICE Trust will create two positions: A Client Position of the clearing member that mirrors the transaction between the client and the clearing member, and an offsetting House Position of the clearing member.

Under the "prime broker" or "designated clearing member" model, a client agrees to a CDS transaction with a clearing member (executing dealer) other than the member that clears the client's transactions. The clearing member, as prime broker, and the executing dealer would enter into a trade and submit it to ICE Trust for clearing, and the clearing member and the client would simultaneously enter into an offsetting trade. The net result would be that the client's clearing member and the client would be counterparties to one transaction, the clearing member would have a Client Position with ICE Trust that mirrors its transaction with the client, and the executing dealer would have a House Position with ICE Trust.

Under the Non-Member Framework, ICE Trust would have no direct relationship with or liability to clients. To facilitate the transfer or liquidation of clearing member-client transactions if a clearing member defaults, ICE Trust will require clearing members to pledge to ICE Trust their rights under the clearing member-client transactions and their rights to related margin. This pledge would secure the clearing members' obligations to ICE Trust under the related client positions, and their obligations to other clients under other clearing member-client transactions. The request states that a negotiated International Swaps and Derivatives Association (ISDA) master agreement between the clearing member and its client, supplemented by a Standard Annex approved by ICE Trust,<sup>13</sup> will

<sup>13</sup> The Standard Annex would treat these clearing member-client CDS transactions differently from other derivatives transactions between those parties. It would make the CDS transactions

document the CDS transaction between those parties.

#### 3. Margin Requirements for Clearing Members and Clients

ICE Trust states that the Non-Member Framework is intended to protect clients from default by their clearing members, particularly with regard to their initial margin, and that central clearing of CDS generally is intended to enhance the financial stability of CDS markets as a whole.

ICE Trust rules establish a framework for the collection and protection of client margin and will require clearing members to collect sufficient amounts of initial and variation margin from clients for CDS transactions that ICE Trust clears.<sup>14</sup> Clearing members will be able to collect additional margin from customers beyond what ICE Trust rules require.

Under ICE Trust rules, promptly upon receipt clearing members must post ICE Gross Margin (the gross initial margin collected from clients) to ICE Trust as custodian. Prior to posting, the clearing member must segregate that ICE Gross Margin.

ICE Trust will determine the ICE Net Margin requirement for each clearing member with regard to the cleared CDS positions of all of the member's clients. Clearing members could use collateral posted by clients to satisfy this obligation. ICE Trust rules require that clearing members post both the ICE Net Margin, and the remainder of the margin that clearing members collect from their clients pursuant to ICE Trust rules, to the Custodial Client Omnibus Margin Account that would be maintained at ICE Trust or a subcustodian.<sup>15</sup>

ICE Trust or the subcustodian will hold the Custodial Client Omnibus Margin Account for the benefit of all clients of the relevant clearing member (or for the clearing member as agent or custodian on behalf of such clients), and segregate it from other assets of the

submitted to ICE Trust for clearing subject to separate ICE Trust margin requirements; incorporate a standard definition of clearing member default (based on a determination by ICE Trust); and specify procedures for remedies in the case of a clearing member default. The client also could agree that certain default portability rules would apply.

<sup>14</sup> ICE Trust rules permit clearing members to calculate the initial margin collected from individual clients on a net basis, across all of the CDS transactions of that customer that are cleared through ICE Trust. The rules will not permit clearing members to net across multiple clients cleared through ICE Trust. ICE Gross Margin collected by a clearing member from a client must be pledged by the client to the clearing member, and must not be subject to liens or other encumbrances in favor of third parties.

<sup>15</sup> This order contains several conditions related to this account.

clearing member (including assets in its proprietary House Account). ICE Trust rules require clearing members to maintain records that include the clients' identities, the margin they post, the transfer of those assets to the Custodial Client Omnibus Margin Account, and the use of that margin.

#### 4. Default and Portability Rules

ICE Trust rules also require clearing members to agree to the transfer of clearing member-client transactions and related positions upon a client's request, provided that the client obtains a new clearing member willing to accept the positions. In connection with that transfer, ICE Trust would move related margin between the Custodial Client Omnibus Margin Accounts of the two clearing members.

In the event of a client or clearing member default, ICE Trust's rules provide for an orderly transfer, termination, or liquidation of clearing member-client transactions. Upon a clearing member default, if ICE Trust terminates a clearing member-client transaction, ICE Trust will not net termination amounts owed by a client against termination amounts owed with respect to the client's other trades with that clearing member. This is intended to facilitate portability of positions. ICE Trust also would undertake a close-out process, including calculating separate net termination amounts with respect to the closeout of the clearing member's House Positions and its Client Positions,<sup>16</sup> which would not permit netting between those positions. To protect the clearing system, however, ICE Trust would offset any amount that the clearing member owes to ICE Trust with respect to Client Positions against any amount that ICE Trust owes to the clearing member with respect to House Positions.

The default rules in the Standard Annex provide that, if a clearing member defaults, ICE Trust may transfer clearing member-client transactions to a new clearing member, or otherwise establish replacement transactions. If ICE Trust is unable to transfer, or terminate and replace the transactions, the client may terminate them.

ICE Trust states that if a clearing member default is due to a client's default, ICE Trust may use the margin posted to the clearing member's Custodial Client Omnibus Margin Account up to the amount of the ICE

Net Margin requirement, but will not be able to access the remainder of a non-defaulting client's assets. As a result, the clients of a clearing member are subject to the risk of loss resulting from the default of another client of that clearing member, up to the amount of the clearing member's net margin requirement.

If a client owes amounts to the clearing member with respect to the cleared CDS transactions, ICE Trust will apply the client's margin in the Custodial Client Omnibus Margin Account to satisfy that obligation, and the client's margin thereafter would be available to pay amounts that client owed to ICE Trust and to other clients with respect to their clearing member-client transactions. Conversely, clients owed by the clearing member on a net basis will have a claim for that amount, together with their pro rata share of margin being used to satisfy the ICE Net Margin requirement.

Clients will be entitled to the return of their remaining excess margin in the Custodial Client Omnibus Margin Account, except to the extent that ICE Trust applies the margin to satisfy the client's obligation to the clearing member. Clients will share in the assets in the Custodial Client Omnibus Margin Account in proportion to their claims, but will not be entitled to the return of specific assets in that account.

#### *B. Conditional Temporary Exemption for Certain Clearing Members and Certain ECPs*

In the March 6, 2009 order, Treasury concluded that the central counterparty (CCP) clearing facility for CDS proposed by ICE Trust may increase transparency, enhance counterparty risk management, and contribute generally to the goal of mitigating systemic risk. Treasury further recognized the possibility that applying the full range of GSA requirements to certain CDS market participants that are not registered or noticed government securities brokers or government securities dealers could deter some of them from using ICE Trust to clear CDS transactions where the CDS references a government security, and thereby reduce the potential systemic risk mitigation and other benefits of central clearing. Consistent with these findings, as well as with the public interest and the protection of investors, Treasury temporarily exempted ICE Trust, certain clearing members, and certain ECPs from some of the GSA provisions. For similar reasons, Treasury extended these temporary exemptions in the December 7, 2009 order.

Treasury believes that facilitating the central clearing of CDS transactions with an appropriate, temporary exemption will increase transparency, enhance counterparty risk management, and contribute generally to the goal of mitigating systemic risk. Treasury also believes that facilitating the central clearing of customer CDS transactions will help the customers of clearing members manage counterparty risk.

Treasury is mindful that such an exemption must require securities intermediaries that receive or hold funds and securities on behalf of others to comply with standards that safeguard the interests of their customers. For example, a registered or noticed government securities broker or government securities dealer must segregate assets held on behalf of customers from proprietary assets because segregation will assist customers in recovering assets in the event the government securities broker or government securities dealer fails. To the extent that funds and securities are not segregated, they could be used by an intermediary to fund its own business and satisfy its debts if it were to fail. Moreover, the maintenance of adequate capital and liquidity protects customers, CCPs, and other market participants. Adequate books and records (including both transactional and position records) are necessary to facilitate day-to-day operations as well as to help resolve situations in which an intermediary fails and either a regulatory authority or receiver must liquidate the firm. Appropriate records also are necessary to allow examiners to review for improper activities.

At the same time, requiring such intermediaries to register as government securities brokers or government securities dealers may deter the use of CCPs for customer CDS transactions, which could lessen the counterparty risk and systemic risk reduction benefits associated with central clearing.

Those factors weigh in favor of not applying the requirements of the GSA to these intermediaries, conditioned on them taking reasonable steps to increase the likelihood that their customers would be protected if the intermediary became insolvent. This requires balancing the promotion of central clearing of customer CDS transactions and customer protection. While the conditions imposed in this order serve to minimize the risk to customers, these conditions cannot provide legal certainty that customer collateral would be protected if an ICE Trust clearing member were to become insolvent.

Treasury recognizes that requiring clearing members that receive or hold

<sup>16</sup> ICE Trust would not undertake this process, however, if the defaulting clearing member's receiver (such as the Federal Deposit Insurance Corporation or similar authority) transfers the relevant positions to another non-defaulting entity in accordance with applicable law.

customer collateral to satisfy these conditions will not guarantee the return of a customer's assets if a clearing member becomes insolvent, particularly in light of the fact-specific nature of the insolvency process and the diversity of insolvency regimes that may apply to ICE Trust members clearing for U.S. customers. Treasury believes, however, that the customer segregation requirements we impose in this order as conditions on the temporary exemption are reasonable steps to increase the likelihood that customers could access their assets in such an insolvency event. Treasury also recognizes that these customers generally will be sophisticated market participants who can weigh the risks associated with entering into arrangements with intermediaries that are not registered or noticed government securities brokers or government securities dealers, particularly in light of the disclosures required as a condition of this temporary exemption.

For these reasons, the Secretary finds that it is consistent with the public interest, the protection of investors, and the purposes of the Exchange Act to grant the conditional, temporary exemption set forth below. This exemption will expire on March 7, 2010, unless Treasury renews, revokes, or modifies it. This exemption is consistent with a recent modification and extension of temporary exemptions the Securities and Exchange Commission (SEC) granted related to a request from ICE Trust concerning central clearing of CDS.<sup>17</sup>

### C. Consultations and Considerations

In ordering this exemption, Treasury has consulted with and considered the views of the staffs of the SEC, the Commodity Futures Trading Commission (CFTC), and the financial institution appropriate regulatory agencies.<sup>18</sup>

Treasury finds that the circumstances upon which it issued and extended the March 6, 2009 order, including

mitigation of potential systemic risk, still exist and therefore Treasury believes that granting this temporary exemption to accommodate customer clearing is warranted and appropriate.

Treasury bases this order on the facts and circumstances presented and representations made by ICE Trust in the request. ICE Trust has indicated that there have been no material changes to any of the facts or circumstances set forth in its request in support of the March 6, 2009 order, and the request for extension and modification of that order, that would cause such representations to no longer be materially accurate.

### III. Solicitation of Comments

When Treasury issued the March 6, 2009 order, we solicited comment on all aspects of the temporary exemptions, and specifically requested comment as to the duration of the temporary exemptions and the appropriateness of the exemptive conditions. We received no comments.

In connection with this order to accommodate central clearing of customer CDS transactions, we request comments on the relief we are granting in connection with customer clearing and whether the conditions we have placed on the relief adequately protect customer funds and securities from the threat posed by clearing member insolvency.

Treasury will continue to monitor ICE Trust's progress and the development of CCPs for the CDS market and determine to what extent, if any, additional action might be necessary. For example, as circumstances warrant, certain conditions could be added, altered, or eliminated from this order. Treasury will consider whether the temporary exemption should be extended or allowed to expire.

Treasury also will continue to consult with the staffs of the SEC, the CFTC, and the appropriate regulatory agencies for financial institutions on this matter.

You may send comments to: Government Securities Regulations Staff, Bureau of the Public Debt, 799 9th Street, NW., Washington, DC 20239-0001. You may also send comments by e-mail to [govsecreg@bpd.treas.gov](mailto:govsecreg@bpd.treas.gov). Please provide your full name and mailing address. You may download this order, and review the comments we receive, from the Bureau of the Public Debt's Web site at <http://www.treasurydirect.gov>. The order and comments also will be available for public inspection and copying at the Treasury Department Library, Room 1428, Main Treasury Building, 1500 Pennsylvania Avenue, NW.,

Washington, DC 20220. To visit the library, call (202) 622-0990 for an appointment.

### IV. Conclusion

*It is hereby ordered*, pursuant to Section 15C(a)(5) of the Exchange Act, that, until March 7, 2010:

#### *Exemption—Conditional Temporary Exemption for Certain ECPs and Certain Clearing Members.*

(a) *Persons eligible.* This exemption is available to certain ECPs<sup>19</sup> and certain clearing members. Excluded from eligibility for the exemption are clearing members and ECPs that are registered or noticed as government securities brokers or government securities dealers under Section 15C(a)(1) of the Exchange Act, ECPs as defined in Section 1a(12)(C) of the Commodity Exchange Act, and ECPs that are not clearing members and that receive or hold funds or securities for the purpose of purchasing, selling, clearing, settling, or holding cleared CDS positions for other persons.

(b) *Scope of exemption.* Subject to the conditions specified in paragraph (c) of this section, certain ECPs and certain clearing members, solely with respect to cleared CDS, are exempt from the provisions of Section 15C(a), (b), and (d) (other than subsection (d)(3)) of the Exchange Act, and the rules thereunder.

#### *(c) Conditions for all clearing members.*

(1) Each clearing member relying on this exemption must be in material compliance with ICE Trust rules.

(2) Each clearing member relying on this exemption that participates in the clearing of cleared CDS transactions on behalf of other persons must promptly provide a certification to ICE Trust that states that the clearing member is relying on the temporary exemption.

(d) *Additional conditions for certain clearing members.* Each clearing member that receives or holds funds or securities for the purpose of purchasing, selling, clearing, settling, or holding cleared CDS positions for U.S. persons (or for any persons if the clearing member is a U.S. clearing member)—other than for an affiliate that controls, is controlled by, or is under common control with the clearing member—also must comply with the following six conditions with respect to such activities:

(1) *No natural persons.* The U.S. persons (or any persons if the clearing member is a U.S. clearing member) for whom the clearing member receives or holds such funds or securities may not be natural persons.

<sup>17</sup> Securities Exchange Act Release No. 34-61119 (December 4, 2009). Order Extending and Modifying Temporary Exemptions Under the Securities Exchange Act of 1934 in Connection with Request from ICE Trust U.S. LLC Related to Central Clearing of Credit Default Swaps, and Request for Comments. See <http://www.sec.gov>. The SEC's order relates only to and is necessary only for CDS that are not swap agreements under Section 206A of the Gramm-Leach-Bliley Act.

<sup>18</sup> The definition of *appropriate regulatory agency* with respect to a government securities broker or a government securities dealer is set out at 15 U.S.C. 78c(a)(34)(G). The definition includes the Board of Governors of the Federal Reserve System, the Comptroller of the Currency, the Federal Deposit Insurance Corporation, the Director of Thrift Supervision, and in limited circumstances the SEC.

<sup>19</sup> See note 5, *supra*.

(2) *Disclosures.* The clearing member must disclose to such U.S. persons (or to any such persons if the clearing member is a U.S. clearing member) that: (i) The clearing member is not regulated by Treasury or the SEC; (ii) U.S. government securities broker and government securities dealer segregation requirements and protections under the Securities Investor Protection Act will not apply to any funds or securities held by the clearing member; (iii) the insolvency law of the applicable jurisdiction may affect such persons' ability to recover funds and securities, or the speed of any such recovery, in an insolvency proceeding; and (iv) if applicable, that non-U.S. clearing members may be subject to an insolvency regime that is materially different from that applicable to U.S. persons.

(3) *Prompt transfer of funds and securities.* As promptly as practicable after receipt, the clearing member must transfer such funds and securities (other than those promptly returned to such other person) to: (i) The clearing member's Custodial Client Omnibus Margin Account at ICE Trust; or (ii) an account held by a third-party custodian, subject to the requirements in paragraph (6) of this section.

(4) *Segregation until transfer.* To the extent there is any delay in transferring such funds and securities (collateral) to the third parties identified in paragraph (3) of this section, the clearing member must segregate the collateral in a way that, pursuant to applicable law, is reasonably expected to protect such collateral from the clearing member's creditors. The clearing member must not permit persons for whom the clearing member receives or holds such funds and securities to "opt out" of such segregation even if regulations or laws otherwise would permit it.

(5) *Cooperation with SEC.* The clearing member must provide the SEC, upon request, with:

(i) Information or documents within its possession, custody, or control; (ii) Testimony of its personnel; and (iii) Assistance in taking evidence relating to cleared CDS transactions from other persons, wherever located, upon the SEC's request or pursuant to agreements between the SEC or the U.S. Government and any foreign securities authority (as defined in Section 3(a)(50) of the Exchange Act). If applicable foreign law or regulation prohibits the clearing member from providing this information, documents, testimony, or assistance, the clearing member must exercise its best efforts to provide it, including requesting the appropriate governmental body and, if legally

necessary, its customers (with respect to customer information) to permit the clearing member to provide it to the SEC. If the clearing member is still unable to provide it despite the clearing member's best efforts, then this exemption shall no longer be available to the clearing member.

(6) *Requirements for third-party custodian account.* A clearing member that transfers customer assets to an account held by a third-party custodian under paragraph (3) of this section must notify such custodian that the following requirements apply:

(i) *How funds and securities are held.* Funds and securities maintained by a third-party custodian must be held:

(A) In the name of a customer, subject to an agreement to which the customer, the clearing member, and the custodian are parties, which states that the assets held are customer assets used to collateralize obligations of the customer to the clearing member, and the clearing member or the custodian must not pledge or rehypothecate the assets held in that account; or

(B) In an omnibus account for which the clearing member maintains a daily record as to the amount held in the account that is owed to each customer, and which is subject to an agreement between the clearing member and the custodian, which states that:

(1) The custodian is holding all assets in that account for the exclusive benefit of the clearing member's customers and separate from any other accounts maintained by the clearing member with the custodian;

(2) The custodian will not use the account assets as security for a loan to the clearing member and account assets must not be subject to right, charge, security interest, lien, or claim of any kind in favor of the custodian or any person claiming through the custodian; and

(3) Neither the clearing member nor the custodian will pledge or rehypothecate the assets.

(ii) *No affiliation.* The third-party custodian must not be an affiliated person of the clearing member.

(iii) *Entity and capital requirements.*

(A) If the third-party custodian is a U.S. entity, it must be a bank (as that term is defined in section 3(a)(6) of the Exchange Act), have total capital, as calculated to meet the applicable requirements imposed by the entity's appropriate regulatory agency (as defined in section 3(a)(34) of the Exchange Act), of at least \$1 billion, and have been approved to engage in a trust business by its appropriate regulatory agency.

(B) If the custodian is not a U.S. entity, it must have total capital, as calculated to meet the applicable requirements imposed by the foreign financial regulatory authority (as defined in section 3(a)(52) of the Exchange Act) responsible for setting capital requirements for the entity, equating to at least \$1 billion, and must provide the clearing member, the customer, and ICE Trust with a legal opinion stating that:

(1) The account assets are subject to regulatory requirements in the custodian's home jurisdiction, designed to protect and provide for the prompt return of custodial assets in the event of the custodian's insolvency; and

(2) That the assets held in that account reasonably could be expected to be legally separate from the clearing member's assets in the event of the clearing member's insolvency.

(iv) *Investment of customer funds.* The clearing member may invest customer funds in Eligible Custodial Assets as that term is defined in ICE Trust's Custodial Asset Policies.

(v) *Notice to ICE Trust.* The clearing member must provide notice to ICE Trust that it is using the third-party custodian to hold customer collateral.

The temporary exemption contained in this order is based on the facts and circumstances presented in the request and is conditioned on compliance with the terms of this order. This temporary exemption could become unavailable if the facts or circumstances change such that the representations in the request are no longer materially accurate or in the event of non-compliance. If the SEC were to withdraw or modify the terms of its order, Treasury may revoke or modify this order accordingly. The status of cleared CDS submitted to ICE Trust prior to such change would be unaffected.

**Michael S. Barr,**

*Acting Under Secretary for Domestic Finance.*

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## DEPARTMENT OF THE TREASURY

### Internal Revenue Service

#### **Open Meeting of the Area 6 Taxpayer Advocacy Panel (Including the States of Arizona, Colorado, Idaho, Montana, New Mexico, North Dakota, Oregon, South Dakota, Utah, Washington, and Wyoming)**

**AGENCY:** Internal Revenue Service (IRS) Treasury.

**ACTION:** Notice of meeting.